UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MYRON MILLER, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C01-4124-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Myron Miller ("Miller") appeals the decision by an administrative law judge ("ALJ") denying him Title II disability insurance ("DI") benefits. Miller argues the ALJ erred in finding he retains the physical residual functional capacity to perform substantial gainful activity, and the Record lacks substantial evidence to support the ALJ's conclusion that Miller is not disabled. (*See* Doc. No. 10)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Miller protectively filed an application for DI benefits on August 19, 1996, alleging a disability onset date of January 23, 1996. (R. 14, 89-92) The application was denied initially on November 27, 1996 (R. 14, 72 74-77), and on reconsideration on March 18, 1997 (R. 14, 73, 81-84). Miller requested a hearing, which was held before ALJ Jean M. Ingrassia on March 5, 1998, in West Des Moines, Iowa. Attorney Ruth Carter represented Miller at the hearing. Miller and Vocational Expert ("VE") Jeff Johnson testified at the hearing. (R. 41-71)

On July 27, 1998, the ALJ ruled that Miller was not entitled to benefits for the period prior to March 5, 1998 (the date of the ALJ hearing). The ALJ found Miller was disabled and entitled to benefits from March 5, 1998, forward. (R. 11-34) The Appeals Council of the Social Security Administration denied Miller's request for review on October 25, 2001 (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Miller filed a timely Complaint in this court on December 19, 2001, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Miller's claim. Miller filed a brief supporting his claim on

April 22, 2002 (Doc. No. 10). On June 5, 2002, the Commissioner filed a responsive brief (Doc. No. 11). The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Miller's claim for benefits.

B. Factual Background

1. Introductory facts and Miller's daily activities

At the time of the hearing, Miller was 49 years old, and married. He had a twelfth grade education. Miller was last employed for about the first three weeks of 1996, as a diesel truck mechanic. (R. 45) Miller described the job as "real heavy work all the time." He would tear engines apart, tear transmissions out, change tires, and just do what was needed to maintain big trucks. (R. 46)

Miller previously had worked on refrigeration units for a couple of years, done some air conditioning work, and worked at a hardware store repairing lawn mowers, snow blowers, and other small equipment. (*Id.*)

In January of 1996, while he was working for Fort Worth Carrier Corporation in Arkansas, Miller had an accident while he was working on a tractor trailer. He described the accident as follows:

> I went up to [the] top of the trailer to change the light element on the trailer and I came back down. Went in and got a new element and came out, went back up the trailer and wind or whatever, I don't know, blew me off and I fell . . . on a ladder on my buttocks and it shattered one vertebrae in my back and did something to about four other ones. I was paralyzed for a short time.

(R. 47) As a result of the accident, Miller was awarded permanent total disability in a worker's compensation case[1] and was receiving worker's compensation benefits of $674.00 every two weeks. The comp carrier also paid Miller's medical bills. (R. 48)

Miller underwent surgery in January of 1996, in which he stated doctors "had to rebuild one of my vertebrates [sic]. They took bones out of my hip to repair that and make more vertebrae. And they installed rods in my back to protect this until it healed." (R. 49) Miller had the rods removed from his back in February of 1997, "because they caused me a lot of problems." (R. 49-50) He stated the only thing that had changed since the rods were removed was they no longer protruded from his back when he would be "standing some place, bump the door or whatever." (R. 50)

Miller moved to Sioux City from Arkansas in September 1996. Since moving to Sioux City, his primary treating doctor has been Dr. Samuelson. His treating physician in Arkansas was Dr. Peek, whom he did not see between September 1996 and March 1998. (*Id.*) He had, however, discussed his condition with Dr. Peek by telephone on several occasions, and Dr. Peek had referred him to different doctors. (R. 61) Miller said that when he left Arkansas, Dr. Peek referred him to a Dr. Blume, but Miller felt Dr. Blume "was real ornery" and treated him like "a piece of meat." (R. 51) He saw Dr. Blume for about half an hour and never saw him again. (*Id.*) After removal of the hardware in February 1997, Miller continued to see Dr. Samuelson once or twice a year for medication checks and general follow-up for his back. (R. 52)

With regard to his physical restrictions, Miller stated he "can't really do much of anything." (R. 53) He is restricted to lifting no more than ten pounds, although he seldom tries to lift that much because it causes a lot of pain in his back. The heaviest things he lifts are a grocery sack, a gallon of milk, and a ten-pound bag of potatoes. (R. 54-55)

[1]Miller's disability award was not the result of a worker's compensation hearing, but rather was the result of a settlement agreement.

Miller stated his legs are frequently weak and numb and he loses his balance a lot. He fell down several times over the winter. His doctor has told him there is little that can be done for him. (R. 55) Miller is able to walk "a couple of blocks a day maybe." He does not sit or stand too long, and he lays down a lot during the day. He is more comfortable and has less pain when he is laying down. (R. 56) He is able to go up and down the steps to his basement a couple of times a day. He has trouble bending and cannot bend over or lift up his leg to tie his shoes without experiencing pain. (R. 56-57)

At the time of the hearing, Miller was not participating in any type of exercise. He was scheduled to begin water therapy, which he stated hurts him less than lifting weights and other types of exercise. (R. 57)

In a typical day, Miller would get up, eat breakfast, and then sit or lay down most of the morning. In the afternoon, he might do the dishes, and he vacuums once in awhile. He can drive a car, "but not very far." He might drive a couple of times per week, doing some light shopping for bread and milk or going to visit his mother, who lives about five miles away. Miller's wife works so he is home alone all day. His wife cooks dinner when she gets home. His son, his wife, and his mother do the outdoor work around the house. (R. 58-59)

Miller said he does little for recreation. His wife bowls, but he does not go watch her because he cannot sit for that long. He usually can sit for about an hour and then his legs will get numb and he has to get up and walk around. Miller said his feet "get so hot and cold that I can't tell the difference." (R. 59)

For pain, Miller was taking 300 mg. of Ultram a day. He had been on Ultram for about two years at the time of the hearing. (R. 56) Dr. Herrera had recently prescribed Baclofen for his muscle spasms, and Miller also was taking Amitriptyline to help him sleep. (R. 62) Heat also helps Miller's pain, and he takes hot showers or uses an electric blanket

or heating pad. (R. 64) Miller said his back hurts "[a]ll the time"; the pain is always there, even when he is on medication. (R. 64-65)

2. Miller's medical history[2]

When Miller fell on January 23, 1996, he was admitted to the hospital with a burst compression fracture at T12, and a fragment retropulsed into his spinal canal. He was treated conservatively at first with medication and physical therapy while he was being evaluated for possible surgery. On January 31, 1996, he underwent a transpedicle decompression of the fracture with laminectomy and facetectomy, and an iliac crest bone graft. (R. 159-85) On February 5, 1996, he was transferred to a rehabilitation center where he received occupational and physical therapy for sixteen days. He was discharged on February 21, 1996, with plans to receive physical therapy three times a week for four weeks in his home. His medications upon discharge were Colace, Axid and Ultram. (R. 187-87, 191)

Miller saw Thomas Ward, M.D. on March 26, 1996, complaining of problems with his pain medications, difficulty with left foot weakness, and sexual dysfunction due to pain. (R. 190) The same day, he saw Richard Peek, M.D., complaining of pain with prolonged sitting, and his foot turning blue. At this visit, Miller rated his pain at 8 on a scale of 1 to 10. Dr. Peek adjusted Miller's medications, referred him for a urology consult, and referred him to another doctor to have the thigh portion of his back brace trimmed. Miller was directed to return in one month for follow-up. (R. 196)

Dr. Peek saw Miller again on April 23, 1996, and noted Miller had a good checkup with the urologist. Miller was complaining of lower back pain. Dr. Peek prescribed pool

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[2] A detailed chronology of Miller's relevant medical history is attached to this opinion as Appendix A.

therapy, back exercises, and a lumbosacral corset, and planned to wean Miller from the back brace. Miller was told to return in one month for follow-up. (R. 195)

Miller saw Dr. Peek on May 28, 1996, and reported he was falling with activity. A CT scan showed some improvement. Dr. Peek adjusted Miller's medications, and prescribed physical therapy with a stabilization program, upper and lower extremity strengthening exercises and back stabilization exercises. The doctor noted the rods would probably be removed from Miller's back at six to twelve months post-surgery. (R. 194)

On June 21, 1996, Miller's wife called Dr. Peek to report that Miller was experiencing increased back and bilateral leg pain since beginning physical therapy. His feet would turn blue after his treatments, and they would get hot. He was continuing to have numbness in his feet. Dr. Peek prescribed a Medrol Dose Pack. (R. 194) Miller saw Dr. Peek on June 28, 1996, and complained of both feet turning red and burning with physical therapy. Dr. Peek discontinued Miller's physical therapy and ordered EMG and NCV studies on Miller's legs. Miller was to continue exercise and pool therapy, and the doctor increased his Neurontin and prescribed another Medrol Dose Pack. (R. 193)

Dr. Ward performed EMG and nerve conduction studies on July 10, 1996, and both tests were normal. (R. 188-89) When Miller next saw Dr. Peek on July 31, 1996, he continued to complain of constant back pain, and numbness and tingling in his legs, worse on the left side. Miller said his arms would go numb when they were crossed. The doctor decreased the Neurontin, and directed Miller to continue his home exercise program and return in six weeks for follow-up. Dr. Peek noted Miller was temporarily disabled for six weeks. (R. 192)

Miller underwent an examination by Douglas Martin, M.D. for the Iowa Department of Disability Determination Services Bureau on November 5, 1996. Dr. Martin noted that since Miller's surgery, he had experienced difficulties with numbness and tingling of his lower legs from the knees down to the toes, significant discomfort of the thoracolumbar area

where the rods had been placed in his back, very shaky extremities that sometimes awakened him at night, and increased urinary frequency. Miller reported he had limited his lifting significantly. He wore a corset brace most of the time during the day for stability, and maintaining any position for a prolonged length of time caused problems with his back. Miller had lost 40 pounds since the accident, making the spinal rods more prominent and causing him difficulties. Dr. Martin found Miller had significant limitations with regard to physical activities. He could lift and carry 10 to 15 pounds on an occasional basis. He could stand, move about, walk and sit constantly for an eight-hour work day, as long as he could change posture frequently. He should not stoop, climb, kneel or crawl because of significant limitation in the range of motion of his spine due to the rods. He had no limitations on handling objects, seeing, hearing, speaking, traveling, or environmental conditions. (R. 197-201)

Miller saw Horst Blume, M.D. on November 11, 1996, complaining of deep pain in his mid-thoracic spine and lower back, at the sites of the metal rods and screws. Miller reported that when he walked two blocks, he would get shooting pain down the left buttock, through his left posterior thigh, and into his lower calf and ankle area. The pain would completely resolve after one hour of rest. Miller had pain and achiness in both calves, and a burning sensation and numbness in his feet. He was unable to tell if his feet were cold or warm unless he touched them with his hands. Miller stated he had pain upon awakening in the morning and continuing throughout the day, whether he was performing light activities or just sitting in a chair. He had been stumbling and falling, and experienced weakness in his arms and legs. He had tingling and numbness in his arms and legs, and circulation problems. X-rays showed some bony spur formation at L2/3 and L4 extending to L3. The doctor did not think Miller's hardware was sticking out. He had no objection to removal of the crossbar, but would not recommend removing the other hardware. (R. 202-06)

Lawrence F. Staples, M.D. performed a Residual Physical Functional Capacity Assessment of Miller on November 26, 1996. Miller reported he was able to bathe, dress, shave, and take care of his hair. He could do laundry, dishes, and vacuum if he was careful. He did not mow the lawn, repair the car, rake leaves, or garden. He could drive for short distances. Sitting, standing, walking and exercising made his pain worse, while lying down or sitting in a whirlpool made the pain better. He was taking Ultram and Neurontin regularly. Dr. Staples found Miller could frequently lift or carry up to ten pounds, stand or walk for at least two hours in an eight-hour workday, and sit for about six hours in an eight-hour workday. Miller had an unlimited ability to push or pull, including operation of hand and foot controls. He could frequently climb ramps and stairs and was able to balance. He could occasionally stoop, kneel, crouch and crawl, and had no manipulative, visual, communicative, or environmental limitations. (R. 207-15)

Dr. Peek wrote an opinion letter dated December 24, 1996, in which he stated that although Miller had shown some improvement since his injury, he continued to have residuals of clonus and upper motor neuron syndrome related to the injury. Dr. Peek said Miller had been unemployable since the injury and would continue to be unemployable following removal of the hardware from his back. The doctor found Miller to have significant permanent residuals from his spinal cord injury and fracture. (R. 216)

Miller saw William O. Samuelson, M.D. on January 30, 1997, on a referral from Dr. Peek, to evaluate him for removal of the hardware in his back. Dr. Samuelson noted the hardware was prominent at the incision level, and he scheduled Miller for surgery to remove the hardware on February 25, 1997. (R. 218) The Record does not contain medical records from the surgical removal of the hardware, but it is apparent from later entries and from Miller's testimony that the hardware was, in fact, removed as scheduled.

Dr. Peek completed a questionnaire on April 28, 1997, regarding Miller's physical ability to perform work-related activities. He opined Miller's spinal cord injury supported

the following limitations in his abilities: he can lift and carry less than ten pounds on an occasional or frequent basis, and stand, walk and sit, with normal breaks, for less than two hours during an eight-hour work day. Miller must alternate sitting, standing and walking periodically to relieve discomfort. Before having to change positions, Miller can sit for 15 minutes, stand for 5 to 10 minutes, and walk around for up to 30 minutes in 5-minute intervals. He will need the opportunity to shift at will from sitting or standing/walking, and will need to lie down at unpredictable intervals during a work shift. Miller should never twist, stoop/bend, crouch, and climb stairs or ladders. His overhead reaching is affected by his impairment, but he has no limitations in handling (gross manipulation), fingering (fine manipulation), feeling, and pushing/pulling. Miller has no restrictions with respect to temperature extremes, wetness, humidity, noise, fumes, odors, dusts, gases, or poor ventilation. He should avoid all exposure to hazards, such as machinery and heights. Dr. Peek concluded that Miller is unable to work. (R. 219-21)

Dr. Peek also completed a Physical Residual Functional Capacity Questionnaire on April 28, 1997. He noted Miller's prognosis was guarded, and Miller's symptoms included burning in both feet, difficulty walking, and lower back pain. Dr. Peek stated Miller is not a malingerer and emotional factors do not contribute to the severity of his symptoms and functional impairment. Miller experiences pain or other symptoms that are severe enough to interfere with his attention and concentration, and Miller has marked limitation in his ability to deal with stress in the workplace. If Miller were placed in a competitive work situation, Dr. Peek estimated Miller would be able to walk less than one city block without rest. He could sit continuously for 15 minutes and stand for 10 minutes at one time, and sit, stand or walk less than two hours in an eight-hour workday. He would need to walk around for four to five minutes every half hour during an eight-hour workday, and he would have to be able to shift positions at will from sitting, standing or walking. He sometimes would need to take an unscheduled break for 15 minutes every hour during the workday. He could

sit without elevating his legs, but sometimes would need a cane for standing or walking. He could occasionally lift less than 10 pounds, and never lift 10 or more pounds. Miller has significant limitations in doing repetitive reaching, handling or fingering because of his back problems. He can never bend and twist at the waist. Dr. Peek concluded Miller is unable to work, and he had immediate symptoms from his spinal cord injury that have not gone away. (R. 222-26)

On April 30, 1997, Dr. Blume completed a Physical Residual Functional Capacity Questionnaire. His opinions differed from Dr. Peek's opinions in the following respects. Dr. Blume found Miller's prognosis to be "fair," where Dr. Peek had noted his prognosis to be "guarded." Dr. Blume found Miller had only a slight limitation in the ability to deal with work stress; Miller could walk up to two city blocks without rest; he could continuously sit and stand for one hour at one time; and Miller would not need a cane or other assistive device for standing or walking. Miller could occasionally lift 10 pounds, and he could bend at the waist 30% of the time and twist at the waist 10% of the time during an eight-hour work day. Miller's impairments produced "good days" and "bad days," and would cause him to be absent from work more than three times per month. In all other respects, Dr. Blume's assessment of Miller's abilities was in agreement with Dr. Peek's assessment. (R. 227-31)

Dr. Blume also completed a questionnaire regarding Miller's ability to perform work-related activities. The respects in which Dr. Blume's opinion differed from Dr. Peek's are as follows. Whereas Dr. Peek found Miller could stand for 5-10 minutes before changing positions, Dr. Blume found Miller could stand for 30 minutes at a time before changing positions, and he could occasionally stoop/bend and crouch. Dr. Peek found Miller had no restrictions with regard to temperature extremes and environmental conditions, but Dr. Blume found Miller should not be exposed to extreme cold, heat or humidity. Otherwise, Dr. Blume's assessment of Miller was the same as Dr. Peek's assessment. (R. 232-34)

Dr. Peek saw Miller for a complete physical examination in early March 1998. Miller exhibited clonus in the lower extremities with spastic gait from his spinal cord injury. His guarded motion indicated he was experiencing severe lower back pain. Miller was unable to sit or stand in one position for any period of time without discomfort. Dr. Peek stated his answers to the 4/26/97 questionnaire had changed in that Miller was experiencing increased leg pain. (R. 243-44)

Miller underwent an MRI of the lumbar spine on March 7, 1998. The MRI showed a slight hump ("gibbus") at the junction of the T11 disc with the posterior superior corner of the anteriorly compressed T12 disc, with the spinal cord appearing to be somewhat narrowed and angulated at that juncture, although there was no encroachment on the spinal cord. (R. 239)

Dr. Peek saw Miller again on March 16, 1998, for continued complaints of lower back pain and severe pain in both legs. Miller reported he was not working and had to lie down frequently. Dr. Peek opined Miller "has really had the same problems since Day 1," and noted an area of the spinal cord that had been injured. Dr. Peek noted that further surgery would not help improve Miller's condition due to spinal fluid posterior to the cord. Miller was working with Dr. Guerrero, a rehab physician, and Dr. Peek recommended he continue that treatment. He stated Miller "is disabled from employment," and is "unable to walk, stand or bend for any length of time." (R. 241-42) He noted further:

> [Miller] has sustained clonus of the lower extremities, affecting his ability to walk and function and control the lower extremities. Distal to the spinal cord injury he has a burning area which affects his ability to concentrate and work in a cognitive position. Unfortunately, I am afraid he will have chronic problems. The MRI does show the injured area of the cord."

(R. 242)

3. Vocational Expert's Testimony

The ALJ asked the VE the following hypothetical question:

> [W]e have a 49-year-old with a twelfth grade education. Surgery with spinal instrumentation and fusion in January of '96, hardware removal in January of '97, no treatment notes for all of 1997 and no residual functional capacity assessment made by the Workers' comp. carrier so I don't have too much to go on. Except exhibit 8F page two and [Miller's] testimony. And in that regard according to exhibit 8F page two[,] Dr. Martin indicated that [Miller's] lifting and carrying would be limited to ten to fifteen pounds on an occasional basis. And I think that corresponds with [Miller's] testimony. However, he would not be able to do this repetitively or on a sustained basis, but only on an occasional basis. Dr. Martin also indicated that in regard to standing, moving about[,] walking and sitting[,] he didn't have any particular concerns with him doing that but that he wouldn't be able to do it constantly and he would need to alternate these positions. Probably every one to two hours. He would not be able to do any significant stooping, climbing, kneeling or crawling because of the limited range of motion of his spine. I think those are the primary limitations set out in exhibit 8F page two in November of '96. All of that prior to the removal of the instrumentation but we don't have any follow up except some statements made from doctors who basically don't explain their findings, particularly Dr. Blume and Dr. Peak [sic]. With those restrictions[,] would he be able to perform any of his past work activity?

(R. 65-66)

The VE responded that the hypothetical claimant would be precluded from performing any of Miller's past work, either as that work was performed by him or as it is generally performed in the national economy. (R. 66) The VE also opined the hypothetical claimant would not have transferable skills; however, the claimant would be able to perform "a full range of sedentary unskilled work activities [and] less than [the] full range of light unskilled work activities." (*Id.*) The VE provided examples of light occupations including office

helper, assembler in production, and cashier at a parking lot. (R. 67) The VE noted the assembler job is "performed at the sedentary level where there would be lowered lifting requirements [and] [a]lso the ability to sit, stand, alternate positions at least every two hours." (*Id.*)

In response to questioning by Miller's attorney, the ALJ confirmed that her hypothetical was based solely on Dr. Martin's assessment, which was performed in November of 1996. (*Id.*) Miller testified he had spent about ten minutes with Dr. Martin, and the doctor performed very little testing. He had Miller walk across the room and raise his arms. The doctor did not perform range of motion tests or strength testing. Miller stated Dr. Martin told him "if I could walk and move my arms then I could work[.]" (R. 69)

Miller's attorney posed the following hypothetical to the VE:

> A claimant that can lift less than ten pounds one third of the day; lift and carry less than ten pounds one third of the day; stand and walk less than two hours in a day; sit less than two hours in a day; must change position every fifteen minutes; must stand five to ten minutes before – must only stand five to ten minutes; walk around every thirty minutes; walk for five minutes each time; shift at will; lie down at unpredictable intervals during the day; cannot twist, stoop, crouch, climb stairs or climb ladders at all; cannot handle with gross manipulation or do fine finger manipulation, feel, push, pull; cannot be around any type of hazards, machinery, heights; and must be absent three times a month. Can that person do repetitive employment?

(R. 69-70) The VE responded that the hypothetical claimant could not perform any repetitive employment. (R. 70)

4. The ALJ's conclusion

The ALJ found Miller had not engaged in substantial gainful activity at any time since his back injury. (R. 32, ¶ 2) She found as follows with respect to Miller's impairments:

> The medical evidence establishes that [Miller] has severe impairments of residuals of spinal cord injury with clonus and paresthesias of the lower extremities with complaints of pain. He is status post lumbar decompression of fracture of T-12 and spinal instrumentation and fusion of T-10 to L-2. He does not, however, have an impairment or combination of impairments listed in, or medically equal to one listed in, [the applicable Regulations].

(*Id.*, ¶ 3)

The ALJ found Miller's subjective complaints not to be credible with respect to "the intensity and severity of his symptoms prior to March 5, 1998," although he was "found to be generally credible" beginning March 5, 1998. (R. 33, ¶ 4) The ALJ found Miller had the following residual functional capacity prior to March 5, 1998:

> [T]o perform the physical exertional and nonexertional requirements of work except for lifting a maximum of 10 to 15 pounds occasionally, he would require the need to alternate sitting and standing every one to two hours, and could do no stooping, climbing, kneeling, or crawling. (Citation omitted.)

(*Id.*, ¶ 5) The ALJ therefore found Miller was not under a "disability" as defined in the Social Security act for the period prior to March 5, 1998. (R. 34, ¶ 13)

After March 5, 1998, the ALJ found Miller to have the following residual functional capacity:

> [L]ift less than ten pounds occasionally, he must be free to take an hour[-]long nap during an eight hour workday, he must be free to alternate sitting and standing at will, and he cannot sustain positions for prolonged periods or do any repetitive bending. He can do no work requiring use of foot controls and cannot stoop, climb, crawl or kneel. He cannot be exposed to

> heights. He cannot do work requiring more than minimal concentration due to pain.

(R. 33, ¶ 6)

The ALJ found Miller "is unable to perform his past relevant work as small engine mechanic, automobile mechanic, [and] refrigeration mechanic," and has no "acquired work skills which are transferable to the skilled or semi-skilled work functions of other work." (R. 33-34, ¶¶ 9 & 10) The ALJ concluded Miller "was unable to perform work at even a sedentary level of exertion beginning March 5, 1998," and therefore she held Miller was under a disability from that date forward, with his disability "expected to persist continuously for at least 12 consecutive months." (R. 34, ¶¶ 12-14)

To substantiate her finding that Miller's subjective pain complaints lacked credibility for the period prior to March 5, 1998, the ALJ pointed to Miller's reports to physicians that he was continuing to improve following his back surgery. At one point, he reported he could walk up to one mile, and he only complained of an inability to perform various activities for brief periods of time, rather than on a sustained basis. (R. 22, 24) The ALJ found Miller

> did not consistently seek medical attention on a regular basis for complaints of ongoing clonus, numbness, and leg pain throughout the relevant period. Given the extensive limitations he reported to Dr. Peek [in March 1998], it is reasonable to assume [Miller] would have regularly sought such treatment. The medical record does not so indicate. [Miller] was also receiving workers' compensation benefits during the relevant period which could have assisted him in paying for medical treatment.

(R. 27)

Evaluating Miller's credibility in light of the factors set forth in *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1984) (discussed further *infra*), the ALJ found Miller's subjective pain complaints not to be credible for the period prior to March 5, 1998. (R. 27-30)

The ALJ noted the questionnaires completed by Miller's treating physician, Dr. Peek, were dated eight months or more after Dr. Peek's last examination of Miller[3], and she further noted that Dr. Peek's responses were inconsistent, "clearly diminish[ing]" the "reliability of his responses." (R. 24) The ALJ also noted several inconsistencies in Dr. Blume's responses to similar questionnaires, diminishing the extent to which she relied upon his opinion. (*Id.*) In addition, the ALJ noted several inconsistencies between the opinions of Drs. Peek and Blume. (*See* R. 24-25)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see

[3]The ALJ noted there is no evidence in the Record that Dr. Peek examined Miller between July 1996, and March 1998. (R. 26)

whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was

sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the Record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the Record in its entirety, taking into account "'whatever in the record fairly detracts

from'" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *accord Gowell, supra; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the Record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the Record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001); *Gowell, supra.*

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are

entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the Record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d at 1322.

IV. ANALYSIS

The court finds it both significant and curious that the ALJ found Miller's subjective pain complaints to be credible at the time of the hearing but not prior to the hearing. Although the ALJ discussed the reasons she chose not to rely on the opinions of Drs. Peek and Blume and the reasons she discredited Miller's allegations of disability prior to the hearing, she failed to explain how Miller's condition or his credibility had changed from the

date of his back injury to the date of the hearing. The court agrees with Miller's observation that "[a]ccording to the ALJ, on March 5, 1998, the very day that Miller testified under oath to the ALJ, his RFC changed[.]" (Doc. No. 10, unnumbered p. 4) The court finds no support in the Record for such a finding, and further finds the Record supports the opposite conclusion; *i.e.*, that Miller has been continuously disabled since the date of his injury on January 23, 1996.

Specifically addressing the ALJ's failure to rely on the opinions of Drs. Peek and Blume, the ALJ noted the questionnaires those physicians prepared for Miller's attorney should be given little weight "[b]ecause of the interpretative problems inherent in the use of forms, such as physical or mental capacity checklists[.]" (R. 22, citing *O'Leary v. Schweiker*, 710 F.2d 1334, 1341 (8th Cir. 1993)). However, as the court noted in *Burtalo v. Shalala*, 1995 WL 324695 (S.D. Iowa, March 8, 1995), "in *O'Leary*, the checklist evidence contradicted other evidence in the record as a whole. *See O'Leary*, 710 F.2d at 1341." *See also Vonbusch v. Apfel*, 132 F. Supp. 2d 785, 798 n.6 (D. Neb. 2001), ("*O'Leary* in fact stands for the proposition that a checklist used by a *non-treating physician* to deny disability benefits will be given little weight when it conflicts with the records of the treating physician. *Gutzman v. Apfel*, 109 F. Supp. 2d 1129, 1134 (D. Neb. 2000)." (Emphasis added).)

In the present case, as in *Burtalo*, the evidence in the Record as a whole *supports* the conclusions noted in the questionnaires by Drs. Peek and Blume. The court finds the inconsistencies in these two doctors' opinions that were relied upon by the ALJ to be both minor and inconsequential. Furthermore, to paraphrase the *Burtalo* court, "[i]f the ALJ was dissatisfied with the form in which the opinions were presented, [s]he had a duty to develop the Record fully and fairly so that [s]he could make an informed decision about plaintiff's . . . health. *See Payton v. Shalala*, 25 F.3d 684, 686 (8th Cir. 1994)." *Id.*

Finally, the court finds the ALJ's reliance solely upon Dr. Martin's opinion for purposes of her hypothetical to the VE to be inadequate. Dr. Martin made his assessment of Miller based on a ten-minute examination in November 1996, yet the ALJ discounted the opinions of Miller's treating physician, Dr. Peek, because he had not seen Miller since September 1996, just two months prior to Dr. Martin's assessment. The court finds Miller's hypothetical question to the VE more accurately reflected his actual functional limitations than did the ALJ's hypothetical.

Viewing the Record as a whole, the court finds substantial evidence exists to support a finding that Miller has been continuously disabled since January 23, 1996, and therefore the Commissioner's decision should be reversed.

V. CONCLUSION

Having found Miller is entitled to benefits for the period from January 23, 1996, to March 5, 1998, the court may affirm, modify or reverse the Commissioner's decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself "convincingly establishes disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate." *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); *accord Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). Consequently, it is recommended that the court reverse the ALJ's decision and remand this case to the Commissioner for an award of benefits in the appropriate amount.

IT IS RECOMMENDED, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of Miller[5] and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for the calculation and award of benefits.

IT IS SO ORDERED.

DATED this 29th day of July, 2002.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

[5]If final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.